

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 23-1529V

UNPUBLISHED

GAVIN SHERMAN,

Petitioner,

v.

SECRETARY OF HEALTH AND  
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: May 1, 2024

*Bijan Esfandiari*, Wisner Baum LLP, Los Angeles, CA, for Petitioner.

*Julia M. Collison*, U.S. Department of Justice, Washington, DC, for Respondent.

### **DECISION**<sup>1</sup>

On September 5, 2023, Gavin Sherman filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 through 34<sup>2</sup> (the “Vaccine Act”). Petitioner alleges that he suffered various injuries due to human papillomavirus (“HPV”) vaccines he received on July 9, 2019, September 12, 2019, and January 16, 2020. ECF No. 1 at 2.

Because the petition was untimely filed, and Petitioner has failed to establish a basis for equitable tolling, this case is **DISMISSED**.

### **Relevant Factual Background**

Petitioner stated he received HPV vaccinations on July 9, 2019, September 12, 2019, and January 16, 2020. ECF No. 1. However, Petitioner has not submitted the

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<sup>1</sup> Because this Decision contains a reasoned explanation for the action taken in this case, it must be made publicly accessible and will be posted on the United States Court of Federal Claims' website, and/or at <https://www.govinfo.gov/app/collection/uscourts/national/cofc>, in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2018) (Federal Management and Promotion of Electronic Government Services). **This means the Decision will be available to anyone with access to the internet.** In accordance with Vaccine Rule 18(b), Petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access.

<sup>2</sup> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “Sec.” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

administration records to establish these vaccinations, a vaccination history, or even identified the medical facility where the vaccines were administered.

After the third HPV vaccination, Petitioner stated that he experienced daily essential tremors, high heartrate, and heart palpitations by March 2020. ECF No. 1 ¶ 5. Petitioner was later diagnosed with postural orthostatic tachycardia syndrome (“POTS”), anemia, tachycardia, and chronic colitis. *Id.* ¶ 6.

Petitioner alleged the preceding medical history in the petition and repeated the history in his response to the order to show cause. Facially, Petitioner’s claim herein was filed over *three and a half* years after his last HPV dose, which was administered in January 2020, and three and a half years after he began manifesting symptoms in March 2020. But Petitioner maintains his delay is excusable. Thus, in an affidavit dated November 17, 2023, Petitioner has attested that, at the time these vaccinations occurred, no Vaccine Information Statements (VIS) were provided and no information was relayed about the Vaccine Program. Exhibit 2 ¶¶ 3, 4. Petitioner only learned that the HPV vaccine might be capable of causing adverse effects in June 2023. *Id.* ¶ 6.

### **Relevant Procedural History**

Given that the timeliness of the claim was legitimately called into question merely by the face of the actual Petition, while the case was still in the initial “pre-assignment review” (a process utilized by the Office of Special Masters to assess whether a claim’s primary evidentiary documentation has been filed), I ordered Petitioner to show cause why the claim had not been filed outside the Act’s 36-month statute of limitations. Sec. 16(a)(2); ECF No. 6.

On November 21, 2023, Petitioner filed a response. ECF No. 7. Petitioner did not dispute that the onset of symptoms occurred more than three years before the petition was filed in 2023, but instead argued that the limitations period should be equitably tolled. Petitioner asserted that he had diligently pursued his rights once he realized the connection between his injuries and the HPV vaccine and became aware of the Vaccine Program. Petitioner also made allegations not relevant to a Vaccine Act claim, about the perfidious conduct of the vaccine manufacturer in fraudulently concealing the HPV vaccine’s harmful character from the public. ECF No. 7 at 19. Relatedly, Petitioner argued that the failure of a healthcare professional to provide him with a VIS at the time of vaccination can be attributed to the Department of Health and Human Services’ failure to systematically ensure that VIS are provided and explained to all vaccine recipients. *Id.* at 5.

On January 10, 2024, Respondent submitted a responsive brief of his own, arguing for dismissal due to untimeliness. ECF No. 10. Respondent maintained that Petitioner in

fact had not diligently pursued his rights before filing a vaccine claim in 2023. Respondent also disputed the veracity of contentions about the manufacturer's conduct, and whether it could in any event constitute an extraordinary circumstance that would serve as a basis for tolling of the statute.

On January 24, 2024, Petitioner filed a reply to Respondent's arguments. ECF No. 11. The reply generally reiterates Petitioner's prior arguments. Petitioner later filed some medical records. ECF Nos. 12, 13.

### **Legal Standards**

The Vaccine Act's statute of limitations is thirty-six months. Sec. 16(a)(2). The statute begins to run from the manifestation of the first objectively cognizable symptom, whether or not that symptom is sufficient for diagnosis (or even recognized by a claimant as significant). *Id.*; *Carson v. Sec'y of Health & Hum. Servs.*, 727 F.3d 1365, 1369 (Fed. Cir. 2013).

The Federal Circuit has held that the doctrine of equitable tolling can apply to Vaccine Act's statute of limitations. See *Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340-41 (Fed. Cir. 2011). However, in keeping with applicable U.S. Supreme Court precedent, equitable tolling of a limitations period is to be permitted "sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, (1990). The appropriateness of equitable tolling is ultimately to be determined on a case-by-case basis, without rigid application of any relevant overarching guidelines. *Holland v. Florida*, 560 U.S. 631, 649–50 (2010); accord *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289, 1295 (Fed. Cir. 2012).

Petitioners must prove two elements to establish equitable tolling: (1) that petitioner diligently pursued her rights, and (2) an extraordinary circumstance prevented her from timely filing the claim. *K.G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1379 (Fed. Cir. 2020) (citing *Menominee Indian Tribe v. United States*, 577 U.S. 250, 255 (2016)). When first articulating this limited exception to equitable tolling, the Federal Circuit primarily enumerated fraud and duress—but not, for example, *lack of awareness* on a petitioner's part that she might have an actionable claim. *Cloer*, 654 F.3d at 1344–45 (noting that tolling of the Vaccine Act's statute of limitations period is not triggered "due to unawareness of a causal link between an injury and administration of a vaccine").

### **Analysis**

The untimeliness of this filing is acknowledged by Petitioner, so the only question to be resolved is whether equitable tolling should save the claim. But Petitioner has failed to establish both elements of equitable tolling – diligent pursuit and extraordinary circumstances.

*A) Diligent pursuit*

Petitioner was thirty-seven years old when he received the first HPV vaccination in 2019 and thirty-eight years old when he received the second and third doses. Petitioner argues that he was impeded by the failure of the vaccine administrator to provide him with a VIS or any other information about the Vaccine Program. Petitioner only began to diligently pursue a vaccine claim after he learned that the HPV vaccine had potential adverse effects in June 2023.

These arguments are wholly unpersuasive. It is beyond question that claims asserted in the Vaccine Program are not subject to a “discovery rule,” accruing only when a claimant *learns* he or she might possess a cause of action. Rather, the statute of limitations period is triggered by the onset of Petitioner’s symptoms – whether or not onset was understood to be the start of the claimed injurious illness or condition. *Cloer v. Sec’y of Health & Hum. Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc). And the failure to be advised of the Vaccine Program or the Act does not support equitable tolling of the statute of limitations period for an otherwise-untimely filed petition. *Speights v. Sec’y of Health & Hum. Servs.*, No. 03-2619V, 2013 WL 5944084, at \*13 (Fed. Cl. Spec. Mstr. Oct. 17, 2013). Thus, a petitioner cannot generally shield an untimely claim from dismissal by asserting, even in good faith, that she literally was unaware of her Vaccine Act “rights.”

*B) Extraordinary Circumstances*

Petitioner’s arguments about the purported fraudulent conduct of the vaccine’s manufacturer, in hiding proof of the vaccine’s dangers, deserve even less consideration. ECF No. 7 at 19. As a threshold matter, these contentions are speculative and not evidentiarily-supported. And regardless of their actual truth, the fact remains that the Government *has approved* the HPV vaccine for administration to minors, rendering it “covered” under the Act. The only issue to be resolved in a Program case is whether (assuming, as here, the claim is not a Table claim) the claim meets the standards for causation – and those standards have nothing to do with a manufacturer’s alleged misconduct in preparation or promotion of the underlying vaccine.

These allegations also are not a basis for tolling under the circumstances. Petitioner simply has not shown that contentions of corporate misconduct not specific to, or directed at, him personally could rise to the level of the kind of “fraud” that might excuse failing to file a Program claim in a timely manner. Nor has he persuasively established that the vaccine administrator’s “failure to warn,” or provide a VIS in 2019 or 2020, is an

extraordinary circumstance. Even assuming the factual accuracy of that allegation,<sup>3</sup> it remains the case (as the Circuit recognized in *Cloer*) that vaccine claims accrue upon onset – and that the failure to be advised of the Vaccine Program does not support equitable tolling. *Cloer*, 654 F.3d at 1340; see also *Speights*, 2013 WL 5944084, at \*13. And arguments about governmental agency knowledge of a failure to warn reflect overheated, almost-conspiratorial allegations that do not come close to excusing the claim's untimely nature.

Finally, Petitioner also asserts that the safety of the HPV vaccine is “in dispute [and] the Court should not simply accept the assertions of the Respondent over those of the Petitioner without further proceedings including expert testimony on the subject.” No. 11 at 2. But this argument willfully ignores the extent to which I have personally ruled in numerous prior cases that medical science does not preponderantly support the contention that the HPV vaccine can cause POTS or other autonomic issues. See, e.g., *J.S. v. Sec'y of Health & Hum. Servs.*, No. 16-1083V, 2022 WL 20213038, at \*20 (Fed. Cl. Spec. Mstr. July 15, 2022), *mot. for review denied*, 164 Fed. Cl. 314 (2023), *appeal docketed*, No. 23-1644 (Fed. Cir. Mar. 22, 2023); *Hughes v. Sec'y of Health & Hum. Servs.*, No. 16-930V, 2021 WL 839092, at \*31 (Fed. Cl. Spec. Mstr. Jan. 4, 2021), *mot. for review denied*, 154 Fed. Cl. 640 (2021); *E.S. v. Sec'y of Health & Hum. Servs.*, No. 17-480V, 2020 WL 9076620, at \*40, 43 (Fed. Cl. Spec. Mstr. Nov. 13, 2020), *mot. for review denied*, 154 Fed. Cl. 149 (2021); *McKown v. Sec'y of Health & Hum. Servs.*, No. 15-1451V, 2019 WL 4072113, at \*44–45 (Fed. Cl. Spec. Mstr. July 15, 2019). The Act does not require that the same theory rejected so many times before must be relitigated by the Program ad infinitum (especially in the absence of new compelling evidence). Rather, special masters are expressly empowered to rely on their expertise, earned in adjudicating Program cases, in subsequent similar matters. To suggest that they should ignore what they have learned in that process reveals a complete miscomprehension of the Program's underlying goals and purposes.

### **Conclusion**

Thus, Petitioner has failed to establish equitable tolling. **This case is dismissed for being untimely filed. The Clerk of Court shall enter judgment accordingly.**<sup>4</sup>

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<sup>3</sup> Vaccine administration records typically state whether VIS are provided to patients and/or whether patients have been counseled about the vaccine. As noted above, Petitioner has not submitted any vaccine administration records, a vaccination history, or even identified the vaccine administrators to establish the HPV vaccinations. Thus, Petitioner has not submitted any contemporaneous medical records of the vaccination to determine whether a VIS was provided to him. Petitioner's only evidence that no VIS or information about the Vaccine Program was provided is his affidavit dated November 17, 2023, in which he attested about events that occurred over three years earlier. Exhibit 2 ¶¶ 3, 4.

<sup>4</sup> If Petitioner wishes to bring a civil action, he must file a notice of election rejecting the judgment pursuant to § 21(a) “not later than 90 days after the date of the court's final judgment.”

**IT IS SO ORDERED.**

**s/Brian H. Corcoran**

Brian H. Corcoran  
Chief Special Master